

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DIANNE ARAGON,

No. C 07-2925 CW

Petitioner,

v.

ORDER DENYING
PETITION FOR WRIT
OF HABEAS CORPUS

SCHELIA A. CLARK, Warden,

Respondent.

Petitioner Dianne Aragon brings this action seeking a writ of habeas corpus under 28 U.S.C. § 2241. In opposing the petition, Respondent Schelia A. Clark argues that it should be dismissed because Petitioner has not exhausted her administrative remedies. Petitioner has submitted a traverse responding to this argument. The matter was taken under submission on the papers. Having considered all of the papers submitted by the parties, the Court denies the petition.

BACKGROUND

Petitioner is currently serving a term of fifteen months of imprisonment on a conviction for conspiracy to distribute a mixture containing methamphetamine and cocaine. She is incarcerated at the Federal Prison Camp in Dublin, California, where Respondent is

1 warden. She filed this petition challenging a Bureau of Prisons
2 (BOP) regulation, 28 C.F.R. § 570.21, that denies inmates placement
3 in a community corrections center (CCC)¹ until the last ten percent
4 or six months of their sentence, whichever is shorter. Petitioner
5 claims that this policy is contrary to 18 U.S.C. § 3621(b), which
6 governs the placement of inmates in BOP custody.

7 Pursuant to the challenged regulation, Petitioner has been
8 scheduled for transfer to a CCC on December 28, 2007, the beginning
9 of the last ten percent of her sentence. She seeks an order
10 requiring Respondent to consider her appropriateness for transfer
11 to a CCC in light of the factors set forth in 18 U.S.C. § 3621(b),
12 notwithstanding the time limits imposed by 28 C.F.R. § 570.21. She
13 claims to be "in the process of exhausting her administrative
14 remedies through the BOP's administrative appeals process." Pet.
15 at 3. However, Respondent has filed a declaration with supporting
16 documentation showing that Petitioner has not filed a request for
17 an administrative remedy at any level on any issue.

18 DISCUSSION

19 The Ninth Circuit requires, "as a prudential matter, that
20 habeas petitioners exhaust available judicial and administrative
21 remedies before seeking relief under § 2241." Castro-Cortez v.
22 INS, 239 F.3d 1037, 1047 (9th Cir. 2001).² The requirement may be

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24 ¹CCCs were formerly known as halfway houses. Respondent uses
25 the term "residential reentry center" to refer to the same type of
institutional setting.

26 ²Because exhaustion is required under this authority, the
27 Court need not consider Respondent's argument that the Prison
Litigation Reform Act, 42 U.S.C. § 1997e, also requires exhaustion
28 of administrative remedies in this case.

1 waived in limited circumstances, including when pursuit of
2 administrative remedies would be futile. See Laing v. Ashcroft,
3 370 F.3d 994, 1000-01 (9th Cir. 2004) (listing circumstances when
4 waiver of the exhaustion requirement may be appropriate).

5 Petitioner argues that pursuing administrative remedies would
6 be futile here because the BOP promulgated the challenged
7 regulation under a categorical exercise of its discretion, and the
8 regulation does not permit exceptions for individual inmates.
9 However, Petitioner's unsupported contention that administrative
10 remedies would be futile does not persuade the Court to waive the
11 exhaustion requirement. The Court notes that all four of the
12 circuit courts that have considered the validity of the BOP's
13 policy have found it invalid. Wedelstedt v. Wiley, 477 F.3d 1160
14 (10th Cir. 2007); Levine v. Apker, 455 F.3d 71 (2d Cir. 2006);
15 Fults v. Sanders, 442 F.3d 1088 (8th Cir. 2006); Woodall v. Fed.
16 Bureau of Prisons, 432 F.3d 235 (3d Cir. 2005). Several district
17 courts in the Ninth Circuit have also found the policy contrary to
18 18 U.S.C. § 3621(b). See Whistler v. Wrigley, 2007 WL 1655787, at
19 *3 (E.D. Cal.) (listing cases).

20 Recent actions of the BOP suggest that it may be reconsidering
21 its policy in response to the numerous cases rejecting its
22 regulation as contrary to statute. For instance, in Whistler, the
23 BOP informed the court that it had evaluated the petitioner's
24 request for administrative relief without reference to the time
25 constraints imposed by 28 C.F.R. § 570.21 and had transferred him
26 to a CCC, leading the court to dismiss the petition as moot. Id.
27 at *6-*7. Consequently, it is not clear that Petitioner's pursuit
28

1 of administrative remedies would be futile; there is a possibility
2 that BOP officials will provide her the relief she seeks. Multiple
3 courts in this district have recognized this possibility, and have
4 required other habeas petitioners challenging the BOP regulation to
5 exhaust their administrative remedies. See, e.g., Carrillo v.
6 Clark, 2007 WL 3026674 (N.D. Cal.); Rojero v. Clark, 2007 WL
7 3026415 (N.D. Cal.); Espinoza v. Clark, 2007 WL 2990157 (N.D.
8 Cal.); Cristobal v. Clark, 2007 WL 2746742 (N.D. Cal.); Zavala v.
9 Clark, 2007 WL 2705216 (N.D. Cal.); Reyna v. Copenhagen, 2007 WL
10 2504983 (N.D. Cal.); Felty v. Clark, 2007 WL 2438337 (N.D. Cal.).
11 The Court agrees with the reasoning of these decisions, and
12 concludes that waiver of the exhaustion requirement is not
13 warranted in this case.

CONCLUSION

14
15 For the foregoing reasons, the Court DENIES Petitioner's
16 petition for a writ of habeas corpus without prejudice to her
17 filing a new one after exhausting the BOP's administrative appeals
18 process. The clerk shall close the file.

IT IS SO ORDERED.

Dated: 12/14/07



CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

DIANNE ARAGON,

Plaintiff,

v.

SCHELIA A. CLARK et al,

Defendant.

Case Number: CV07-02925 CW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on December 14, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: December 14, 2007

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk

United States District Court
For the Northern District of California